



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

May 31, 2013

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Cynthia E. Hudson, Esquire
City Attorney for the City of Hampton
Office of the City Attorney
22 Lincoln Street
Hampton, Virginia 23669

Dear Ms. Hudson:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You pose four questions regarding the operation of “churning” activities in the City of Hampton. First, you ask whether the City of Hampton, through its police division, is authorized to conduct churning operations to detect crimes involving the diversion of tobacco products. You next ask whether funds derived from a churning operation are exempt from laws generally governing the use of local government funds. Third, you ask whether the operation’s funds and other assets become the property of the City of Hampton at the conclusion of the churning operation. Finally, you ask at what point in time the City of Hampton may appropriate, or otherwise lawfully commence a process for expenditure of such funds.

Response

It is my opinion that the City of Hampton may lawfully conduct churning operations to detect crimes involving the diversion of tobacco products. It is further my opinion that funds derived from a churning operation, of which the city ultimately may obtain an ownership interest, are not exempt from general laws governing the use of local government funds. In addition, this Office cannot definitively opine on the ownership of the completed operation’s residual funds and other assets. Finally, it is my opinion that the City of Hampton may not appropriate or expend such funds until it establishes a lawful ownership interest in them.

Background

You relate that, in June, 2010, the Hampton Police Department entered into an agreement with the Federal Bureau of Alcohol Tobacco, Firearms and Explosives (ATF) to combat illegal cigarette trafficking. Through this partnership, a Hampton-based undercover operation was formed to target individuals who purchased cigarettes in Virginia and then sold them in higher tax states in order to make a profit. Pursuant to § 15.2-1726 of the *Code of Virginia*, the Hampton Police Division executed a

memorandum of understanding with ATF (“the MOU”) detailing the methodology and respective responsibilities of the parties.¹ ATF assumed operational control.

You state that ATF used federal money to create a fictitious business entity that sold tobacco products to cigarette traffickers. Through the fictitious entity, ATF and Hampton Police purchased cigarette inventory, opened bank accounts, secured credit cards and leased property to conduct the business. ATF “churned” the proceeds from these commercial transactions to offset expenses incurred during the undercover operation. Any additional moneys generated by the operation were deposited into the operation’s bank accounts to fund future transactions.

You report that ATF suspended its participation in the operation in October, 2010, after an assigned ATF agent was arrested on allegations that he personally had benefited from the churning activities. By that time, the cigarette sales through the undercover enterprise had resulted in accumulation of several hundred thousands of dollars. These funds were deposited into the fictitious entity’s bank account. Hampton Police chose to continue the operation without the participation of ATF and used churning proceeds to purchase vehicles, computer equipment, and other property; however, in late January, 2012, the Hampton Police Chief decided to halt the operation based on alleged officer misconduct and requested the Virginia Department of State Police conduct an independent criminal investigation.

You indicate that approximately \$750,000 was generated through the churning operation and remains in the fictitious entity’s account. The property purchased with churning operation funds (vehicles, electronic equipment, and other office equipment) is kept separate from other city properties and is not being used. You state that, other than budgeted salaries for Hampton police officers, no City funds were expended in support of the operation.

Applicable Law and Discussion

In determining the power of a local governing body, Virginia follows the Dillon Rule of strict construction, which provides that “municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”²

Section 15.2-1102 of the *Code of Virginia* confers general police powers on cities and towns that are not:

expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof[.]

¹ As part of your inquiry, you provide an executed copy of the MOU. The parties to it are the Hampton Police Department, ATF, the Virginia State Police, the Newport News Police Department, the Norfolk Police Department, and the Portsmouth Police Department. In addition, for background information, you provide a copy of a related Memorandum of Understanding, dated February 23, 2011, between the Hampton Police Division and the Office of the Hampton Commonwealth’s Attorney.

² *Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (citations omitted).

The Supreme Court of Virginia has construed broadly this general grant of police powers to localities when public safety and morals are involved.³

Moreover, Hampton's participation in a churning operation through its police department is not expressly prohibited by the Constitution or the general laws of the Commonwealth. Thus, it is my view that employing a churning operation to combat tobacco trafficking in Hampton is fairly implied in and consistent with the legislative grant of police power set forth in § 15.2-1102. The Hampton City charter further utilizes similar language to confer powers to the city to promote the general welfare of the city and the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants.⁴ The city, through its police force, may deem a churning operation proper to provide for the safety, health, peace, good order, comfort, convenience, and morals of its inhabitants and would be authorized to conduct such an operation to deter criminal activity, including the illegal trafficking of cigarette products.⁵ Thus, the city's police powers under § 15.2-1102 and its charter are broad enough to encompass the described churning operations.

The Hampton City Charter provides that "[a]ll moneys received or collected for the use of the city from any source shall be paid over, held and disbursed as the council may order or resolve, and in such depository or depositories as may be prescribed by the council, either by ordinance or resolution."⁶ In addition, § 15.2-2506 of the *Code of Virginia* prescribes that,

No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body[.]

I find no other law that otherwise would apply to govern how such proceeds from a churning operation are to be handled.⁷ Therefore, to the extent that the city ultimately may obtain a lawful ownership interest in such funds, and consistent with their accumulation through a public safety-related operation in

³ See *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (holding that general delegations of authority may be broad enough to permit localities to restrict sales of firearms); *King v. Cnty. of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954) (holding that county ordinance prohibiting keeping of vicious dogs was valid); *Assaid v. Roanoke*, 179 Va. 47, 18 S.E.2d 287 (1942) (concluding that city had power to regulate operation of pool rooms); see also 1994 Op. Va. Att'y Gen. 29, 31-32 (noting that state court decisions and prior opinions of the Attorney General have concluded that a locality's general police powers are broad enough to sustain local regulation of a wide range of activities and subjects).

⁴ CHARTER FOR THE CITY OF HAMPTON, VA., § 2.01; see § 2.03.

⁵ The terms of the MOU set forth a number of stated purposes, including to, "Conduct undercover operations where appropriate and engage in other traditional methods of investigation in order that the Task Force's activities will result in effective prosecution before the courts of the United States and the Commonwealth of Virginia." Under the section entitled, "Measurement of Success", one such criterion is listed as, "The reduction of loss of tax revenues caused by contraband alcohol and tobacco trafficking." Thus, in general, the churning operation you describe appears to be within the scope of the MOU and consistent with the anticipated law enforcement task force activities pursuant to it.

⁶ *Id.*, § 6.07.

⁷ You state that on October 12, 2012, the Commonwealth's Attorney for the City of Hampton determined that, "these assets are not, in his opinion, subject to forfeiture and their disposition must be determined by the city." You also note that no seizures were made as a result of the churning operation. As such, the procedures contained in Chapter 22.1 (§ 19.2-386.1, *et seq.*) of Title 19.2 of the *Code of Virginia* would appear to be inapplicable to your opinion request.

Hampton, it is my view that the moneys collected from tobacco sales were “for the use of the city.”⁸ In that instance, and in conformity with the above-cited provisions of Virginia law and the city’s charter, the funds may be appropriated and expended as the council provides.

The MOU section entitled, “Duration,” establishes how to effect termination of the agreement and sets forth the federal guidelines to which the parties must refer to govern the distribution of residual funds from task force operations:

This MOU shall remain in effect until it is terminated in writing (to include electronic mail and facsimile). If any participating agency withdraws from the Task Force prior to its termination, the remaining participating agencies shall determine the distributive share of assets for the withdrawing agency, in accordance with Department of Justice guidelines and directives.

Thus, a distribution of residual funds and other assets depends upon a written termination notice from a withdrawing participant in the MOU, and, upon a withdrawal from the task force created by it, adherence to the governing terms of the Department of Justice standards for such a “distributive share of assets.” Based upon the information you provide, neither ATF nor the City of Hampton’s police division have provided written notice of termination of the MOU or intent to withdraw from the task force created by it.⁹

The issue whether “the proceeds of such a churning operation and goods purchased with churning funds become the property of the city” is beyond the scope of this opinion. You note that while ATF ceased its participation in and apparently abandoned the joint operation, and initiated no prosecutions based upon it, “there is no indication that the ATF terminated the MOU with Hampton in accordance with its terms which provide for termination by ATF in writing.” Pursuant to the above-referenced specific termination-related provisions of the MOU, it is not possible to now opine on how residual funds and the proceeds from other assets might be divided between the City of Hampton, the federal government, and, perhaps, other law enforcement organizations participating in the MOU.¹⁰ Moreover, unless you were to present a specific legal question relating to the termination of the MOU, this Office would decline to interpret the provisions of such an agreement between a locality and other entities.¹¹

Finally, it is axiomatic that the City of Hampton may not make an appropriation or expenditure of residual funds or the proceeds from other assets derived from the churning operation unless and until it acquires a lawful ownership interest in them.¹² It has not yet established such an ownership interest.

⁸ CHARTER FOR THE CITY OF HAMPTON, VA., § 2.01.

⁹ No Department of Justice guidelines or directives were provided to this Office.

¹⁰ Hampton city officials may seek to negotiate with ATF or other appropriate federal officials and representatives of the other participating law enforcement organizations on those matters. If necessary, and subject to any governing federal “guidelines and directives,” the city also may consider seeking a judicial determination of ownership through a declaratory judgment or an interpleader action. This Office offers no opinion on the legal availability or efficacy of such potential courses of action.

¹¹ See generally 2010 Op. Va. Att’y Gen. 56, 58 nn. 4,5.

¹² See Virginia Code § 15.2-2506 and § 6.07 of Hampton’s City Charter. It is my view that neither the statute nor the charter provision can reasonably be interpreted to enable the locality to appropriate and expend funds in which it does not possess a lawful ownership interest.

Cynthia E. Hudson, Esq.

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Conclusion

Accordingly, it is my opinion that the City of Hampton lawfully may conduct churning operations to detect crimes involving the diversion of tobacco products. It is further my opinion that funds derived from a churning operation, of which the city ultimately may obtain an ownership interest, are not exempt from general laws governing the use of local government funds. In addition, this Office cannot definitively opine on the ownership of the completed operation's residual funds and other assets. Finally, it is my opinion that the City of Hampton may not appropriate or expend such funds until it establishes a lawful ownership interest in them.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C" followed by a stylized flourish and the Roman numeral "II".

Kenneth T. Cuccinelli, II
Attorney General